Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NO. 79-~~5870~~ 1544

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JAMES GLENN MOORE,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari To the Court of Criminal Appeals Of The State of Texas

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

NANCY M. SIMONSON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits its Brief in Opposition:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals appears as Exhibit B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257(3). The first issue presented by Petitioner, however, was not raised or addressed by the court below. This Court has no jurisdiction to consider that issue and the remaining issue does not present a substantial federal question.

QUESTIONS PRESENTED

Respondent believes that the only issue properly presented to this Court for review may be stated as follows:

I. Whether the Fifth Amendment right to be free from double jeopardy applies to probation revocation hearings in the circumstances presented to this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on Article 1, Sec. 1 to Article 1, Sec. 8, Cl. 3 and the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

On July 16, 1973, Petitioner pled guilty before the state trial court to the offense of burglary. His punishment was assessed at six (6) years imprisonment. The sentence was suspended and Petitioner was placed on probation upon conditions which included that Petitioner, "[c]ommit no offense against the laws of this State or any other State or of the United States . . ." On March 7, 1975, the state filed a motion to revoke Petitioner's probation alleging that he had violated a condition of his probation, in that:

> The Defendant, James Glenn Moore, committed an offense against the laws of the State of Texas, to wit: on or about December 8, 1974, did then knowingly process a usable

> quantity of marijuana of two (2) ounces or less. This offense occurred after July 16, 1973, and during the time of probation.

A hearing was held on this motion on April 14, 1975, and the state's motion for revocation was denied. The record does not reflect the basis for the decision. Later that day, April 14, 1975, Petitioner pled guilty to the possession of marijuana charge.

The state then moved on February 6, 1978, to revoke Petitioner's probation, in that he:

> . . . on or about the 14th day of April, 1975 pleaded guilty in the County Court of Johnson County, Texas, in cause Number 742-M to the misdemeanor offense of possessing a usable quantity of marijuana, to wit: less than 2 ounces, for which defendant was sentenced to serve 180 days in the county jail of Johnson County, Texas. Said judgment is a final judgment and became final during the term of the said defendant's probation.

The trial court, after a hearing on this motion, found Petitioner in violation of the terms of his probation and entered an order revoking it. Petitioner appealed to the Texas Court of Criminal Appeals. His chief contention was that the second revocation proceeding constituted double jeopardy. This contention was overruled by the Court of Criminal Appeals which stated:

> In his third ground of error, appellant contends that the trial court abused its discretion in revoking his probation, in that the same ground for revocation was presented to the trial court three years earlier, and the court, at that time, denied the State's motion to revoke. Appellant contends that this revocation of probation, based on the same ground as presented to the court previously constituted double jeopardy. This contention has been

> previously considered by this Court and rejected in *Davenport v. State*, 574 S.W.2d 73 (Tex.Cr.App. 1078). This ground of error is overruled.

Moore v. State, No. 60,220, slip. op. at 3 (Tex.Cr.App., October 31, 1979); (Petition, A.5).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE FIRST QUESTION PRESENTED IN THE PETITION.

The first question presented by Petitioner, concerning the notion of timeliness in a second probation revocation, was not raised by Petitioner in the proceedings below, nor passed upon by the Texas Court of Criminal Appeals. Reference to Petitioner's brief in the Texas Court of Criminal Appeals reveals that, although Petitioner included the phrase, ". . . and after over a three year interval elapsed, . . . " in his third error, the third error was directed entirely to his double jeopardy claim as now reflected in his second question presented. In the "Argument" in his brief in the Texas Court of Criminal Appeals, Petitioner concerned himself only with the double jeopardy issue. The mention of the three year interval served only to emphasize this double jeopardy issue: that the two incidents which Petitioner alleged constituted a double jeopardy violation occurred at two distinct times. Likewise, the opinion of the Texas Court of Criminal Appeals reflects that only the double jeopardy issue was before it and passed upon. At no point in the opinion is the timeliness issue addressed or even alluded to.

It is well established that this "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*,

410 U.S. 351 (1973). This Court has "no jurisdiction unless a federal question was raised *and* decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' " *Cardinale v. Louisiana, supra, citing Crowell v. Randell*, 10 Pet. 368, 391 (1836). (emphasis supplied).

II.

PETITIONER'S APPLICATION FOR CERTIORARI DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BUT SIMPLY A QUESTION OF FACT.

No jurisdiction exists in this Court to hear this case because no federal question is raised. "This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case." *Dept. of Mental Hygiene v. Kirchmer*, 380 U.S. 194, 197 (1965). The basic fault in Petitioner's jurisdictional claim lies in the related factors that the record is ambiguous as to the basis for the trial court's initial decision not to revoke Petitioner's probation and that the question is truly one of fact, apparently resolved by the state courts against Petitioner. Petitioner rests his double jeopardy claim on a number of factual "inferences."

> [I]t is reasonably inferrable from the ruling made by the court that the state had failed to prove by a preponderance of the evidence that a probation violation had been committed by the petitioner, and as a result, the court made a negative finding regarding the allegations that had been presented in the state's motion.[1]

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[1]The reasonableness of the inferences drawn by Petitioner is greatly undercut by his failure to recognize that "The revocation decision has two analytically distinct components." *Gagnon v. Scarpelli, supra*, at 784. The first stage of analysis "involves a wholly

This is simply speculation and surmise. The record fails to support this conjecture. Based on the present state of the record, it is equally reasonable to infer that the state trial court choose to exercise its discretion to await the outcome of the marijuana possession prosecution.[2]

This Court has stated: "It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law. *Nor will we review one until the fact that it does not do so appears of record." Herb v. Pitcain*, 324 U.S. 117, 128 (1945) (emphasis supplied). Herein lies the defect in Petitioner's case. The jurisdictional argument relies on two "facts" not reflected in the record: that the trial court made a specific finding in the first revocation hearing that Petitioner had not been guilty of possession of marijuana and that the basis for the court's subsequent decision to revoke his probation was the fact of possession of marijuana rather than for *conviction* of such an offense. The trial court's opinion clearly reflects

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retrospective factual question: whether the [probationer] has in fact acted in violation of one or more conditions of his [probation]." The second stage of analysis focuses on "should the [probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Id.* at 784. Petitioner's "inferences" do not take into account the essentially subjective inquiry which must follow any finding of a violation of the terms of probation: given the fact of a violation, how can the interests of both the probationer and society best be served -- by revocation or by continued probation?

[2]The lack of clarity as to the precise basis for the trial court's initial refusal to revoke Petitioner's probation precludes a decision on whether the double jeopardy clause forbids the second probation revocation proceeding. *See, Illinois v. Vitale*, _____ U.S. _____, 29 CRIM.L.REP. (BNA) 3190 (June 18, 1980). Petitioner should be required to clarify the factual posture of this case through the use of the habeas corpus procedures that remain available to him before this Court undertakes review of his double jeopardy claim. *Cardinale v. Louisiana*, 394 U.S. 437 (1979).

that the revocation was based on Petitioner's conviction. (*See* Exhibit A of the Petition for Writ of Certiorari).

What is presented, then, "is primarily a factual issue which does not, by itself, justify the exercise of [this Court's] certiorari jurisdiction . . ." *Tacon v. Arizona*, *supra*, 410 U.S. at 352. It is well established that this Court is "[a] court of law . . . rather than a court for a correction of errors in fact finding . . ." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

III.

DOUBLE JEOPARDY PROTECTION IS NOT APPLICABLE TO PROBATION REVOCATION PROCEEDINGS.

The right to be free from double jeopardy adheres only to criminal prosecutions which clearly excludes probation revocations. As this Court has stated, "[p]robation revocation, like parole revocation,is not a stage of a criminal prosecution . . ." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This Court has held that the risk to which the double jeopardy clause refers is not present in proceedings that are not essentially criminal. As stated in *Breed v. Jones*, 421 U.S. 519, 528 (1975): "In the constitutional sense, double jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* went on to extend the right of double jeopardy protection to juvenile delinquency actions. This Court noted the practical similarity between juvenile proceedings and regular criminal prosecutions. "We believe it is simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years." *Id.* at 529.

This Court has consistently made clear, however, that a like relationship does not exist with probation

revocation. In finding that no difference in due process rights existed between parole and probation revocation, the Court observed that:

> Parole arises after the end of the criminal prosecution, including imposition of sentence ... Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Gagnon v. Scarpelli, supra at 781, citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). The Court stressed "... there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon v. Scarpelli, supra*, 411 U.S. at 788-789. This Court, noting that while juvenile delinquency proceedings had been held functionally akin to criminal trials, stated that, "[a] juvenile charged with violation of a generally applicable statute is differently situated from an already convicted probationer or parolee, and is entitled to a higher degree of protection." *Id.* at 789 n. 12.

Similar facts to the present case were confronted in *Dunn v. California Dept. of Corrections*, 401 F.2d 340 (9th Cir. 1968) where the Ninth Circuit held that "[d]ouble jeopardy is not applicable to parole revocation proceedings." *Id.* at 342. The Ninth Circuit in *Dunn* held that although the California Adult Authority may have once determined not to revoke parole for certain drug use it could later consider the same grounds for revocation.

It is clear from *Morrissey* and *Gagnon* that having been tried, convicted, and sentenced, the probationer is in a different position from an individual facing deprivation of his absolute liberty. The imposition of the punishment already assessed to a probationer does not implicate the protection of the double jeopardy clause

for "the Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction not punishment." *Price v. Georgia*, 398 U.S. 323, 329 (1970); *Breed v. Jones*, 421 U.S. 519, 532 (1975).

CONCLUSION

For the reasons stated above, Petitioner has failed to present facts indicating that a review of his contentions is needed and, therefore, the Petition of Writ of Certiorari should be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

TED L. HARTLEY
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

NANCY M. SIMONSON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512)475-3281

Attorneys for Respondent